

SPECIAL CIVIL APPLICATION No 2234 of 1999

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- MR SN SOPARKAR for Petitioner
NOTICE SERVED BY DS for Respondent No. 1
MR MANISH R BHATT for Respondent No. 2

CORAM : MR.JUSTICE R.BALIA. and

MR.JUSTICE A.R.DAVE

Date of decision: 11/05/99

ORAL JUDGEMENT (per R. Balia, J.)

This petition challenges rejection of petitioner's declaration under Kar Vivad Samadhan Scheme promulgated under the Finance (No.2) Act of 1998, inter alia, on the ground that a revision against the order u/s 154 dated 1.1.98 on 29.1.99 was infructuous inasmuch as the order u/s 154 was made without any objection from the assessee petitioner. Such revision has to be ignored. The petitioner cannot be said to be falling within sec. 95(i)(c) of the said Act.

2. The undisputed facts which have emerged from the averments made in the petition and replies for the present purposes are that for the Assessment Year 1996-97 the assessee claimed certain deductions u/s 80I in respect of which assessee has filed an appeal before CIT (Appeals) which was decided on 23.3.97 by which the assessee was allowed a deduction of Rs. 20,80,791. The Assessing Officer, namely, the Deputy Commissioner of Income-tax, was of the view that the said sum has wrongly been allowed in the Assessment Year 1994-95 as assessee has ceased to be eligible for such deduction after A.Y. 1993-94 and this is a mistake apparent on the face of record. A notice to that effect was issued on 4.12.97 purporting to be u/s 154. The assessee realising that this was mistake agreed for the deletion of the said amount from the assessment in pursuance of which an order was made on 1.1.98 deleting the said deduction u/s 80 I and to issue demand notice as a consequence of rectification. Demand notice in pursuance of rectification application showed levy of additional tax which could be charged u/s 143(1A) while making adjustments u/s 143(1)(a). After making the addition of additional tax the entire liability towards tax and additional tax was adjusted against the amounts paid by the assessee and demand notice was issued in respect of interest charged u/s 234A and 234B. Said demand for the A.Y. 1994-95 remains unpaid.

3. With effect from 1.9.1998 Finance (No.2) Act, 1998 had introduced a scheme known as Kar Vivad Samadhan Scheme which provided for settlement of 'tax arrear'. Under sec. 87(m), according to which determination in respect of tax, interest or penalty for any assessment year ought to have been made prior to 31.3.98, subject to

any modification that could be made in that computation for giving effect to appellate orders. To the extent whole or any part of it remains outstanding as on the date of declaration, that is to be considered 'tax arrear' in respect of the concerned assessment year under the Income-tax Act, 1961, which is one of the Direct Taxes Enactment to which KVSS was extended. The second condition relevant for the present purposes is that unless in respect of 'tax arrear' an appeal, reference or writ petition was admitted and pending, or a revision was pending on the date of declaration, no provision of the KVSS would be operative in the case of such person. Likewise, whole or any part of the tax determined on or before 31.3.99 modified by giving effect to the appellate orders should be unpaid as on the date of declaration.

4. The petitioner filed a revision u/s 264 before the Commissioner on 29.1.99 challenging the order u/s 154 dt. 1.1.98 and made a declaration u/s 89 of the KVSS, inter alia, stating that the amount of interest u/s 234A and 234B was determined in respect of Assessment Year 1994-95 prior to 31.3.98, and was still unpaid on the date of declaration and that a revision in respect of 'tax arrear' was also pending as on the date of declaration the assessee fulfils both the conditions. As noticed above, the designated officer, namely, the C.I.T. rejected the declaration stating that a revision against an order, which was made without objection, was infructuous and was merely to take advantage of KVSS which cannot be taken note of.

5. It was urged by learned counsel for the petitioner that, firstly, it is not for the Designated Authority to go into the merits of the pending revision while considering a declaration under KVSS if those two conditions, namely, there being a 'tax arrear' for the Assessment Year and pendency of revision in relation thereto before any forum is pending. Maintainability or the merit of the pending case is not to be examined by him. He has to assume that the demands outstanding against the assessee is recoverable and in respect of which determination of the amount payable by the assessee has to be made by him and on payment of such demand by the assessee, pending litigation would come to an end. Secondly, it was contended that it is not that in the present circumstances the revision filed by the assessee cannot be said to be frivolous or raising dispute where none could have been raised. It was pointed out that as per the order u/s 154 the amount of deduction of Rs. 20,80,791 u/s 80I was directly subject-matter of appeal before the CIT (Appeals) and the deduction was in fact

allowed as per his order. Any alteration, even on the basis of mistake apparent on the face of record, could have been made by CIT (Appeals) only and the ITO or Assessing Officer could not acquire any jurisdiction even by consent of the parties to rectify the order of CIT (Appeals). The order of assessment in respect of deduction u/s 80I stood merged in the order of the CIT (Appeals) when the question about deduction u/s 80I was subject matter of appeal, even before the notice u/s 154 was issued. Likewise, merely because the assessee felt that there existed a mistake in allowing deductions u/s 80I for the Assessment Year 1994-95, and was a mistake apparent from the record, he did not stand on ceremony for insisting the competent authority to make an order of rectification and allowed the Assessing Office to make that correction by withdrawing the relevant deduction u/s 80I notwithstanding he was not competent to rectify the mistake in allowing deduction u/s 80I which was a part of appellate order, he could never be deemed to have consented for levy of additional tax under sec. 143(1A) on account of additions made in that respect, after the order has been made in his favour by the CIT (Appeals), more so when stage for levy of additional tax at the rate of 20% u/s 143(1A) had long ceased to exist. It is not in dispute that the revision filed on 29.1.99 was within limitation. Mere fact that the assessee petitioner preferred his revision after KVSS came into operation, and it may be one of the reasons for filing a revision or appeal thereafter, by itself, cannot be a ground for denying the consideration of declaration on merit.

6. It has been urged by learned counsel for he revenue, on the other hand, that the KVSS which has been designed to bring an end to the litigation cannot be used for the purpose of creating new litigants where there existed none. The revision in the present case which otherwise was not maintainable has clearly been resorted to by the assessee solely for the purpose of taking benefit of declaration under KVSS.

7. Undoubtedly, KVSS had two purposes ingrained in it and they do not exist independently and separately. One is to recover outstanding arrears which have been clogged because of the pending litigation and secondly with the recovery of the said arrears, the pending litigation should also come to an end. In other words, the scheme was extended only to those arrears of such assessment years in respect of which litigation was pending at higher forum, which was or could be used by the assessee as a ground for not paying demands already existing. Obviously, a scheme of this nature cannot be

made a vehicle for raising new disputes where no dispute really existed or the controversy between the parties stood already settled. If any attempt is made in that regard, perhaps, the Court would not be inclined to invoke extraordinary jurisdiction in favour of such litigants. It is also equally true that it is not the condition for operation of KVSS that appeal revision or reference should have come before 31.3.98 or before coming into force of the scheme. It was not intended to curtail the right of any aggrieved party to prosecute his remedies under law.

8. However, in the facts and circumstances of the present case, we are satisfied that the Designated Authority was not justified in rejecting the declaration on the ground that an order u/s 154 has come into existence without opposition from the assessee. The facts noticed by us above, about which there is no dispute, clearly go to show existence of the substance of issue as to the very jurisdiction of the Assessing Officer to make an order u/s 154 in respect of claim to deduction that was subject-matter of appeal before CIT (Appeals), and which already stood disposed of and bona fide of disputing levy of additional tax as a part of demand created as a result of order u/s 154. The assessee by agreeing to withdraw the deduction u/s 80I certainly cannot be deemed to have agreed to charge of additional demand u/s 143(1A). It is also not the case that revision has not come into existence within the period of limitation, so as to suggest that assessee has waived his right to challenge that order. The mere fact that the assessee has not filed revision earlier to coming into force of the KVSS, in the facts of the case, cannot be held against the assessee. If he can legitimately act within the precincts of the statute for pursuing a bona fide dispute, he can also claim the benefit of the scheme promulgated by the Parliament when necessary conditions for availing such benefit has been shown to exist.

9. Indisputably, the assessee, as on the date of declaration, had tax arrear which stood determined prior to 31.3.98 and had also a dispute pending before the CIT by way of revision u/s 264 which could not have been ignored by him. The decision that the revision was infructuous would come only later on and not prior to the date. The fact that the order of CIT (Appeals) later on decides to reject the application for any reasons would not result in non-fulfillment of condition u/s 95(i)(c). The assessee having made the declaration fulfilling both the conditions as on the date of declaration could not

have been denied entry to the portals of KVSS merely because the assessee has agreed to the withdrawal of deduction though at the hands of an authority having no jurisdiction but realising that the deduction was otherwise not sustainable but had bona fide grievance against levy of additional tax u/s 143(1A). The Designated Authority could not examine the merit of issue raised in revision. It was for the revising authority to have determined maintainability or otherwise of the revision before him. He alone could pronounce upon it. When a revision is filed whether it is maintainable or not can only be decided by the revising authority. So also the question about the sustainability of any grounds raised therein rest in the domain of revising authority. Mere fact that revising authority also happens to be designated authority, he cannot merge the two distinct jurisdictions and obligations into one and reflect one order into another. As a designated authority, he has jurisdiction to see only the existence of conditions which makes the KVSS scheme operative in the case. If requirement of the scheme is that a revision in respect of tax arrears is pending, his jurisdiction as designated authority stops to go further on finding as on date of declaration a revision in respect of the order determining the tax demand out of which whole or part sum remains unpaid, is pending. Whether revision has merit or will be successful, is not his domain. That is the domain of revising authority. That jurisdiction he may not be called upon to exercise if on determining the amount payable under the scheme the assessee deposits the same within the time prescribed. Because in such event the revision is deemed to be withdrawn u/s 90(4) of the Finance (No.2) Act of 1998. An authority discharging both the functions cannot by deciding pending revision on merit and reflect that order on merit while acting as designated authority. This is precisely what has been done in the present case.

10. We therefore allow this petition, quash the order at Annexure A dated 26.2.99 and direct the respondent to decide the said declaration afresh in accordance with law.

Notice is discharged.

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